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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Paul S. Grewal, Magistrate Judge

United States of America,

Plaintiff,

VS.

Dennis Collins, et al.

Defendant.

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No. CR11-0471 DLJ

San Jose, California

Friday, February 17, 2012

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING

APPEARANCES:

For Plaintiff:

MELINDA HAAG

United States Attorney's Office

Northern District of California

150 Almaden Boulevard

Suite 900

San Jose, CA 95113

BY: HANLEY CHEW

MATTHEW PARRELLA

ASSISTANT UNITED STATES ATTORNEYS

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Transcribed By:

Stacy Wegner

Transcriber

smwtyping@yahoo.com

(859) 539-2802

APPEARANCES: (Continued)

For Defendant Collins:

Law Offices of Peter Leeming
108 Locust Suite 7
Santa Cruz, CA 95062

BY: PETER A. LEEMING
ATTORNEY AT LAW

For Defendant Cooper:

Law Offices of Michael Whelan, Jr.
703 Market Street #913
San Francisco, CA 94103

BY: MICHAEL WHELAN, JR.
ATTORNEY AT LAW

For Defendant Covelli and Valenzuela:

Nolan, Armstrong, Barton LLP
600 University Avenue
Palo Alto, CA 94301

BY: THOMAS NOLAN
ATTORNEY AT LAW

For Defendant Downey:

Law Office of John Hamasaki
1112 Bryant Street, 3rd Floor
San Francisco, CA 94103

BY: JOHN M. HAMASAKI
ATTORNEY AT LAW

For Defendant Haefer and Vo:

Stanley Cohen and Associates
119 Avenue D, Fifth Floor
New York, NY 10009

BY: STANLEY L. COHEN
ATTORNEY AT LAW

For Defendant Husband:

Law Offices of Ean Vizzi
506 Broadway
San Francisco, CA 94133

BY: EAN VIZZI
ATTORNEY AT LAW

APPEARANCES: (Continued)

For Defendant Kershaw:

Law Offices of Omar Figueroa
7770 Healdsburg Ave
Suite A
Sebastopol, CA 95472

BY: OMAR FIGUEROA
ATTORNEY AT LAW

For Defendant Miles:

Law Offices of Graham Archer
95 S. Market Street
Suite 300
San Jose, CA 95113

BY: GRAHAM E. ARCHER
ATTORNEY AT LAW

For Defendant Murphy:

Carey & Carey
P.O. Box 1040
Palo Alto, CA 94302-1040

BY: ROBERT E. CAREY, JR.
ATTORNEY AT LAW

For Defendant Phillips:

Law Offices of Dena Meierhenry
1415 Fulton Rd # 205-184
Santa Rosa, CA 95403

BY: DENA MEIERHENRY
ATTORNEY AT LAW

For Defendant Puglisi:

John D. Lueck Inc APC
8034 Haven Ave Ste. A
Rancho Cucamonga, CA 91730

BY: JOHN D. LUECK
ATTORNEY AT LAW

For Defendant Sullivan:

Law Offices of Michelle Spencer
55 River Street, Suite 100
Santa Cruz, CA 95060

BY: MICHELLE D. SPENCER
ATTORNEY AT LAW

1 Friday, February 17, 2012

10:05 a.m.

2
3 **THE CLERK:** Your Honor, we are calling United States
4 versus Dennis Collins, et al. Case Number CR11-471.

5 Counsel, please state your appearances.

6 **MR. PARRELLA:** For the Government, Matt Parrella and
7 Hanley Chew. Good morning, Your Honor.

8 **THE COURT:** Good morning, gentlemen.

9 **MR. LEEMING:** And for Mr. Collins, who is appearing
10 by telephone, Your Honor, Peter Leeming. Good morning.

11 **THE COURT:** Good morning.

12 **MR. COHEN:** Good morning, Your Honor. Stanley Cohen
13 on behalf of Mercedes Haefer, who has waived. And I'm also
14 standing in this morning on behalf of Alexis Briggs, who is
15 actually in Minnesota and her client Christopher Vo, who's
16 waived as well.

17 **THE COURT:** Mr. Cohen, good morning, sir.

18 **MR. COHEN:** Good morning.

19 **MR. VIZZI:** Good morning, Your Honor. Ean Vizzi on
20 behalf of Donald Husband whose appearance is waived.

21 **THE COURT:** Good morning.

22 **MR. NOLAN:** Good morning, Your Honor. Tom Nolan on
23 behalf of Mr. Covelli, who's present, Joshua Covelli. And
24 also appearing specially for Mr. Thompson, who's at a
25 preliminary hearing on a homicide case previously set, and I'm

1 appearing for Mr. Valenzuela on that matter.

2 **THE COURT:** Mr. Nolan, good morning, sir.

3 **MR. WHELAN:** Good morning, Your Honor. Michael
4 Whelan for Mr. Cooper, whose presence has previously been
5 waived. Mr. Cooper is available by phone if we need him.

6 **THE COURT:** All right.

7 **MR. WHELAN:** Good morning.

8 **THE COURT:** Good morning, Mr. Whelan.

9 **MR. FIGUEROA:** Good morning. Omar Figueroa for
10 Vincent Charles Kershaw whose presence has also been waived.

11 **THE COURT:** Mr. Figueroa, good morning, sir.

12 **MS. MEIERHENRY:** Good morning, Your Honor. Dena
13 Meierhenry on behalf of Drew Alan Phillips whose presence has
14 been waived.

15 **THE COURT:** Good morning as well.

16 **MR. ARCHER:** Good morning, Your Honor. Graham
17 Archer for Ethan Haindl Miles whose presence has been waived.

18 **THE COURT:** Mr. Archer, good morning, sir.

19 **MR. ARCHER:** Good morning.

20 **MR. HAMASAKI:** Good morning, Your Honor. John
21 Hamasaki on behalf of Keith Wilson Downey whose appearance has
22 also been waived.

23 **THE COURT:** Mr. Hamasaki, good morning.

24 **MR. LUECK:** Good morning, Your Honor. John Lueck on
25 behalf of Jeffrey Puglisi whose appearance has been waived.

1 **THE COURT:** Mr. Lueck, good morning, sir.

2 **MS. SPENCER:** Good morning, Your Honor. Michelle
3 Spencer appearing on behalf of Daniel Sullivan whose
4 appearance has been waived.

5 **THE COURT:** Good morning, Ms. Spencer.

6 **MR. CAREY:** Good morning, Your Honor. Rob Carey.
7 I'm appearing on behalf of James Murphy whose presence has
8 been waived.

9 **THE COURT:** Mr. Carey, good morning, sir.

10 **MR. CARRANZA:** Good morning, Your Honor. Jaime
11 Carranza with U.S. Pretrial Services.

12 **MS. FARAHMAND:** Good morning, Your Honor. Gelareh
13 Farahmand with Pretrial Services.

14 **THE COURT:** All right. Good morning each of you as
15 well. All right. Is there anyone whose appearance has not
16 been made before we turn to the matters at hand? If not, why
17 don't you all take a seat. We've got a lot to cover this
18 morning.

19 I appreciate your filings and have done my best to
20 work through the matrix that you've created for me in terms of
21 joinder and cross-joinder.

22 Without taking up the entire morning reciting
23 exactly my understanding of all the motions that have been
24 filed and all the joinders that have been filed as well, I
25 will simply say that I would like to begin with the motion to

1 compel.

2 I believe it was filed by Ms. Valenzuela, docket
3 192. I believe it's the most challenging of the issues we
4 need to cover, so I'd like to begin with that.

5 Mr. Nolan, it appears you're going to speak first?

6 **MR. NOLAN:** Yeah. I'm going to have to speak for
7 Mr. Thompson and also for Mr. Covelli, since we joined in that
8 matter.

9 **THE COURT:** All right. All right. Well, Mr. Nolan,
10 I -- I believe I understand the -- the parties' positions from
11 the papers, but I'd like to have you explain to me your view
12 of how this return issue relates to the issue of segregation,
13 because as I see it there are really two separate big
14 questions here.

15 The first is whether the Defendants are entitled to
16 a return of the hardware, either in light of a violation of
17 the conditions upon which the seizure of that hardware was
18 authorized, or under the general requirements of Rule 41.

19 So why don't you proceed and --

20 **MR. NOLAN:** Well, let me ask if -- if there's any
21 counsel who wants to address that issue other than myself?

22 I -- I agree with the Court. It's two separate
23 issues. And -- and it appears to me that the -- that if
24 you're going to conduct a search and take a medium that
25 contains a great deal of information -- by the way, it's the -

1 - the information, rather than -- if you're looking at -- at -
2 - at the physical item, they say they're going to forfeit it.

3 Well, that's separate from the information that's
4 contained thereon. I mean, if you were going to give them a
5 hard drive, for example, and say "Copy everything on to my
6 hard drive," then presumably you're entitled to that, and then
7 you're entitled to make motions to suppress or other motions
8 that might pertain to the -- the seizure that you're not
9 allowed to use, etcetera, whether -- on the scope issue.

10 So you know, I -- I -- I think that we're going to -
11 - we're going to return into more of these kinds of problems,
12 and the question is what burden does the Defendant have to
13 receive back versus what -- what requirement the Government
14 has to return.

15 You know, it's -- it seems to me that -- that they
16 know they're not entitled to these documents because they
17 seize them because it would be -- you know, it would be
18 impossible, in their mind, to sit there and separate it out at
19 the scene, but then they have a duty, and it doesn't appear as
20 if they want to fulfill that duty to take -- to do that step.
21 In other words --

22 **THE COURT:** It's a duty that's explicitly set out in
23 attachment C, to at least certain --

24 **MR. NOLAN:** That's right.

25 **THE COURT:** -- warrants, correct?

1 **MR. NOLAN:** Absolutely. Absolutely. Yeah. And a -
2 - and a recognition that, you know, we don't want -- we don't
3 want law enforcement to have to sit there in the house with
4 the -- with the computer for a period of a week to go through
5 it. We're allowing them to take it out.

6 But there's a price for that, and the price is they
7 have to do what they're supposed to do, which is make sure
8 they only seize those things that the warrant in effect tells
9 them they can seize.

10 **THE COURT:** And I -- I take it your view is that
11 Judge Lloyd, among others, relied upon that representation and
12 commitment in authorizing the seizure?

13 **MR. NOLAN:** Absolutely. Absolutely. And -- and,
14 you know, I think as a practical matter, what happens is is
15 that, you know, it's hard to get law enforcement with such a
16 large quantity of information to understand that they can't
17 work on their other matters.

18 They have a duty to the Defendants at that point to
19 -- to do this, and it -- and it's something that may not be
20 something that they can mark in their little book that it was
21 helpful in the investigation. It's a requirement they have to
22 do.

23 And I think that -- I think that -- that it's
24 acknowledged by the search warrant. It's acknowledged that
25 the -- the law that -- you know, that -- that we cited. And

1 the Government didn't cite anything contrary, other than to
2 say "Well, we're going to try to forfeit these -- these
3 items."

4 Again, even if they forfeited -- even if they
5 forfeited the -- the -- the -- the actual computer, they're
6 still required to give me my information that -- that -- that
7 I'm entitled to. So I see that as a duty that they have.

8 And -- and I don't see any -- they can't get around
9 it. Well, I don't know how they can get around that
10 particular duty. Maybe they can get around it by saying
11 "Okay, we'll give you everything back. You know, we'll give
12 you absolutely everything back." Well, then we have to make
13 motions for bills of particulars in terms of what's relevant.

14 But for -- I say fortunately -- maybe unfortunate
15 for their argument -- it gets to the second issue, which is
16 but that doesn't help the other Defendants who are entitled
17 only to material that was seized.

18 And so we -- we really have two reasons why this has
19 to be done this way, you know. One solution could be okay,
20 we've now looked at everything. We've taken the contraband
21 out, and we'll give you back everything else, and that happens
22 in the child pornography cases.

23 In this case, there -- there presumably has been no
24 claim of contraband, but returning the item would -- would be
25 beneficial for each Defendant, but it certainly wouldn't solve

1 the second problem.

2 **THE COURT:** Right. I take it your point is that,
3 for example, Mr. Covelli is entitled to information seized
4 from Ms. Valenzuela --

5 **MR. NOLAN:** Absolutely.

6 **THE COURT:** -- upon which --

7 **MR. NOLAN:** Absolutely.

8 **THE COURT:** -- the Government is relying?

9 **MR. NOLAN:** Oh, yeah. And -- and we've cited on
10 that, and there -- there's no doubt about that. I mean, this
11 is evidence that they may intend to use at trial that we need
12 to know about, we need to examine. It's -- it's Rule 16.
13 It's clear material.

14 So -- and it's not up to the Defendants to make that
15 decision. It's up to the Government. In other words, the
16 Defendants can't make that decision. They can't say "Well,
17 we'll give you in. We won't give you that."

18 I mean, that -- that -- that -- my duty and my
19 responsibility -- I mean, the Government's duty can't be
20 transferred to the Defendants so --

21 **THE COURT:** To say nothing of the cost.

22 **MR. NOLAN:** Well, that -- that is -- that is -- that
23 really goes to the crux, in my opinion, of the problem. And
24 that is, you know, eventually we're going to have -- we're
25 going to have debates about the costs of this kind of

1 prosecution, this kind of discovery mechanism, this kind of
2 problem associated with seizing items.

3 Now, where -- where should -- where should that
4 burden be shown? Are -- are we going to end up with having
5 the Defendants pay for it, at which point Congress is going to
6 say "Well, what is this situation? You know, Sixth Amendment
7 right to counsel, but look at how much it cost."

8 Well, no, it shouldn't be -- it shouldn't be
9 attributed to the accused, the -- the cost. It should be the
10 Government -- I mean, the -- the Justice Departments. It's
11 all Justice Department, but it should be from the prosecution
12 because it's a cost of prosecution. There's a cost associated
13 with that type of seizure, using that type of warrant, you
14 know.

15 And -- and we're just now getting into -- it's easy
16 to say "Okay, let's go in and take the whole warrant -- I
17 mean, take the whole hard drive. It's easy to say. It's
18 convenient. We don't want to sit there," etcetera, but
19 there's a price. And now, in this particular case, we're
20 seeing that price.

21 And -- and I think that -- that unfortunately, you
22 know, we're trying -- we are -- the Defendants are trying to
23 make sure that that price isn't so great as to deprive our
24 client of a Sixth Amendment right to counsel, which we need.
25 And so it's just that a new procedure I think the Government

1 has to get used to doing in a case like this.

2 **THE COURT:** So I take it that the Defendants are
3 asking this Court for an order compelling the Government to
4 segregate that data and make it available to Mr. Aoki within a
5 certain number of days?

6 **MR. NOLAN:** That's exactly right. And just so it's
7 clear, I -- I want to be able to access and copy all relevant
8 materials seized by the Government pursuant to the searches of
9 each and every one of the hard drives that -- that -- in this
10 case, and -- and -- and I want that because I'm entitled to
11 it. I do not want material that is irrelevant --

12 **THE COURT:** Irrelevant.

13 **MR. NOLAN:** -- maybe protected by privileges that
14 the individual has. I -- I don't want irrelevant material.

15 **THE COURT:** Nor do you wish to have the burden or
16 expense of identifying irrelevant material as to your client?

17 **MR. NOLAN:** And -- and -- and, of course, I can't
18 make that determination as to my own client, determining
19 irrelevant material. You know, I -- I mean, might be able to
20 guess, but I'd hate -- I'd hate to choose this is irrelevant
21 and find out oh, they think it's relevant for some particular
22 reason.

23 And -- and -- and I -- I -- I don't want anybody
24 having my client's irrelevant material provided to them, nor
25 do I believe that -- that they should be entitled to it.

1 After I look at what is seized and what they keep
2 and what they claim is relevant, then I can make further
3 motions, beyond the scope of the warrant, you know. I can
4 make all of those appropriate motions, but at the present time
5 it's their duty to -- to segregate it out so that I can ask
6 that Mr. Aoki be provided with the relevant portions of -- and
7 material portions pursuant to Rule 16 of the items seized from
8 the searches conducted in this case from all of the
9 Codefendants in this case. He then can make it available to
10 all counsel who are entitled to that information.

11 **THE COURT:** One -- one further question for you, Mr.
12 Nolan. Is it accurate for me to understand as we sit here
13 today, Mr. Aoki has copies of the data -- all of the data that
14 has been seized on those devices?

15 **MR. NOLAN:** Number one, I believe Mr. Aoki, first of
16 all, has data from two servers. He got that early on. Those
17 servers, everything presumably is relevant or -- and we all
18 have access, or are gaining access to that through the
19 services of the -- of the different vendors.

20 As to the individual drives, I believe he's been
21 sent individual drives of individual Defendants, and each
22 Defendants' attorney has notified most of them -- I can't each
23 and every one -- that they authorize -- that they do not
24 authorize that any material from that computer drive be
25 submitted -- be allowed to be obtained from any other

1 Defendant because they don't know, you know, what is and what
2 is not -- belongs to them, etcetera.

3 So -- now, there is -- there is a -- there is a
4 problem that we can address later, and that is I just got my
5 drive and it's in EnCase form, which is interesting because if
6 you look at the new guidelines that they're talking about AO -
7 - you know, the problem is EnCase is really a Government
8 program. It's very, very difficult to buy. It's very, very
9 difficult to run.

10 And when the Government takes the information from
11 the drive that -- that presumably I could put into a computer
12 and if I knew how to operate it, I can, you know, get the
13 information. They put it in EnCase for investigative purposes
14 and for, you know, analysis, etcetera, and then they give it
15 to me. It's really -- it's really useless. So I mean, that's
16 a separate issue.

17 **THE COURT:** Unless you, of course, take out an
18 EnCase license.

19 **MR. NOLAN:** Unless I take out an EnCase license, and
20 last time -- every time I talk about that, you know, I see the
21 cost. I see the price, but -- and you also have to learn how
22 to use it.

23 The point being is is that they can't take the data,
24 change the nature of the data, and then give it back to me in
25 an unusual -- in a form that makes it near impossible for me

1 to use, but that's a separate -- that's a separate kind of
2 issue.

3 So right now I have a hard drive. Mr. Aoki provided
4 it to me, presumably of Mr. Covelli's computer, and that hard
5 drive is in EnCase, and I now have to figure out how to learn
6 that.

7 But I simply do not have the information from the
8 other Defendants' hard drives, much of which must be relevant
9 because the Government is, in fact, possessing it right now,
10 and I need to know what that is and I need to be able to
11 access it.

12 **THE COURT:** All right.

13 **MR. NOLAN:** I -- I -- I think it -- I think it's --
14 it's -- I think it's pretty clear. I mean, I'm happy to kind
15 of answer your questions, but the -- the case law seems to
16 support this. Practical implications are that this should
17 have happened.

18 And I have no way of figuring out how Mr. Aoki can --
19 -- can devise a way to take my client's hard drive, separate
20 out that which is -- he thinks is relevant, and then give it
21 to Codefendants.

22 And I certainly wouldn't be agreeing to anything
23 because I don't want to be part of that, you know. I want to
24 be able to claim that it wasn't properly done too.

25 **THE COURT:** All right. I think I understand your

1 position, and I understand your interest.

2 Let's hear from the Government on this. Mr.
3 Parrella or Mr. Chew, who is going to speak, please?

4 **MR. PARRELLA:** I will, Your Honor. First of all,
5 let -- let's talk about the -- the issue of segregation. We
6 provided to Mr. Aoki images of every hard drive and computer
7 tower or laptop that was seized from these charged Defendants.
8 Okay.

9 **THE COURT:** Complete images?

10 **MR. PARRELLA:** Yes. Total complete images. He had
11 -- he has them now. We had an agreement that the Defense
12 would segregate them in terms of sharing them with each other
13 because the Defense would know what information they
14 considered to be personal.

15 **THE COURT:** Is this agreement memorialized in any --

16 **MR. PARRELLA:** No. No. This is -- you can see from
17 the emails that were attached to our response that was the
18 operating theory. Individual Defendants were going to review
19 the -- the -- these hard drives.

20 That has now changed. They have reversed course on
21 that. I understand that providing information to each
22 Defendant is the Government's responsibility. We actually
23 have done that. If the Court instructs us that we have to --
24 so -- so we've actually completed it. I mean, we -- we have
25 turned over all the evidence seized from these Defendants to a

1 defense discovery repository.

2 **THE COURT:** But you haven't complied with attachment
3 C; is that fair?

4 **MR. PARRELLA:** Well -- well, we have.

5 **THE COURT:** How?

6 **MR. PARRELLA:** Attachment C allows us, if we find
7 evidence on a hard drive, to keep the entire hard drive in
8 order to establish the authenticity of the hard drive, the
9 completeness of the evidence.

10 **THE COURT:** Attachment C doesn't speak to
11 authenticity of completeness, does it? I didn't see those
12 words anywhere in there.

13 **MR. PARRELLA:** Our attachment C? Yes, that's --
14 that's --

15 **THE COURT:** Where? Maybe I'm missing it. Where
16 does it say that?

17 **MR. PARRELLA:** Well, I -- I -- I don't have it in
18 front of me actually, Your Honor, so --

19 **THE COURT:** All right.

20 **MR. PARRELLA:** And -- and that's where we're --
21 we're coming from. It's only in circumstances where there is
22 segregatable (sic) or it's on a separate hard drive that we
23 would have to then return that hard drive.

24 **THE COURT:** So your view is that the segregation
25 obligation under the Protocol -- Protocol that was drafted, I

1 believe, by the way, with the cooperation of your office --

2 **MR. PARRELLA:** Yeah. I --

3 **THE COURT:** -- obligates the Government to segregate
4 information only on a drive-by drive basis and not a file or
5 directory-or-directory basis?

6 **MR. PARRELLA:** That -- that's -- that's correct,
7 because in order to -- in order to establish the -- the
8 authenticity of the drives and the authenticity of the
9 evidence, we need to keep the original item that was seized.

10 Now, if there's nothing of evidence in a drive, then
11 we don't need to keep that and that can be returned.

12 **THE COURT:** So your view is if there was even a
13 single byte of relevant data on a multi-terabyte server or
14 drive, you'd be entitled to keep the entire drive under this
15 Protocol and attachment based on your need to authenticate
16 that byte later at trial?

17 **MR. PARRELLA:** That's right. That is exactly right.
18 I -- I -- this Protocol was created -- in fact, I wrote it and
19 submitted to Judge Spero, and so it was created by cooperation
20 with my office.

21 If you look at paragraph 9, it says, "For the
22 purposes of this search Protocol, the phrase to preserve
23 evidence is meant to encompass reasonable measures to ensure
24 the integrity of information responsive to the warrant and the
25 methods used to locate the same."

1 Now, I didn't -- I apologize for not using the same
2 language, but I didn't have it in front of me when -- when I
3 argued about authenticity, but that's what I was referring to.

4 **THE COURT:** But of course, the only use of that
5 phrase is in paragraph 1, right? That's what it's defining,
6 isn't it?

7 **MR. PARRELLA:** "To preserve evidence," I think, is
8 used in more than one paragraph, but in any case that is --
9 that is the -- the thrust of -- of -- of that paragraph.

10 So if the Court is saying that we need to segregate
11 out personal data from the hard drives of each Defendant, I --
12 I can understand that -- that concept, and I understood it
13 from the Defense. That's why we offered to let them do it. I
14 -- I -- I understand it's --

15 **THE COURT:** No, but the issue is who has the burden
16 of doing that, right?

17 **MR. PARRELLA:** That's correct. And my --

18 **THE COURT:** Hasn't Judge Jensen made it clear what
19 he thinks about this subject?

20 **MR. PARRELLA:** Well, my only -- my only point in
21 bringing this up is that this is not an issue that's contained
22 within the Protocol.

23 I think the -- I was not present during the argument
24 with Judge Jensen. I think it was -- from my review of the
25 transcript, it was brought up in a -- in a very brief manner.

1 It wasn't completely fleshed out. There were other issues in
2 terms of issues of return involved in that that were, quite
3 frankly, not fleshed out.

4 And while we agree that if we have to segregate it,
5 the Government can do that. It is possible for us to do. My
6 only point is that the -- the -- the Protocol doesn't require
7 that.

8 Imagine we only had charged one person. We would
9 have provided the complete hard drive back to them, and we
10 would be in total compliance with the Protocol. We wouldn't
11 need to segregate that Protocol, if we had items of evidence
12 contained within -- within the seized hard drives.

13 **THE COURT:** But -- but with all due respect,
14 counsel, you didn't charge just one Defendant, right? You
15 charged --

16 **MR. PARRELLA:** Right.

17 **THE COURT:** -- more than a dozen. So when you
18 present this Protocol to colleagues in this district and
19 elsewhere, it seems to me they are -- it's pretty clear
20 they're relying upon the representation that there's going to
21 be some effort -- reasonable effort, perhaps nothing more,
22 nothing less -- to identify the stuff you're entitled to.

23 We all agree you're entitled to certain things under
24 this warrant, but you got to give the other stuff back, or at
25 a minimum you got to make it available in discovery so that

1 each Defendant can understand what evidence might be used
2 against them.

3 Isn't that pretty clear on the face of the Protocol?

4 **MR. PARRELLA:** Well, we -- we did make it available.
5 We gave them copies of it.

6 **THE COURT:** But how are they to sift through all of
7 this data when it's clear there is at least some data -- I
8 suspect there's a lot of data that has nothing to do this case
9 on each one of those hard drives.

10 **MR. PARRELLA:** Well, they would sift through it the
11 way you sift through anything.

12 In a wiretap case we have a thousand hours of
13 conversations. We may only have two hours that are relevant
14 to the investigation, but we turn over a thousand hours of
15 investigation. And -- and they listen to the thousand hours,
16 and they come to a conclusion as to what's relevant or not.

17 **THE COURT:** So your -- your -- your -- your view and
18 your office's view is that under *Brady* and all the Ninth
19 circuit precedent that fall from it, the cost of sifting
20 through all that data falls squarely on the Defendants? The
21 Government bears no responsibility for that?

22 **MR. PARRELLA:** I -- I think it's actually a good
23 point that you bring up, Your Honor, about *Brady* because there
24 are many things -- if we segregate it out and we don't return
25 to them the full and complete copy, later we could be accused

1 -- if there's something that is found to be potentially *Giglio*
2 material or potentially *Brady* material, we'd -- we'd be
3 accused of violating *Brady*. And in -- in fact, what we're
4 trying to do is follow a Court's order to segregate relevant
5 material.

6 That's why we'd rather produce the whole thing.
7 That way it can't said that there's a *Brady* violation or a
8 *Giglio* violation. Somewhere in a unrelated file there may be
9 something that the individual later argues is *Brady*, but if
10 we've turned it over, obviously, it's not *Brady* because it's
11 been disclosed. So -- so that is an issue.

12 There's no way around it that in -- in this type of
13 case, yes, Defense has to bear the burden of analyzing some of
14 this stuff, and looking at some of it and seeing what's
15 relevant and making a decision on their own.

16 **THE COURT:** Are you aware of any circuit or even
17 district court that's ever addressed the issue of the
18 Government's obligation to segregate data in a multi-Defendant
19 case like this?

20 **MR. PARRELLA:** No, I'm not. And I -- I'm not aware
21 of any decision that either says it's the Government's
22 responsibility or it's the Defendants' responsibility or a
23 third option, it's the Government's responsibility to turn
24 everything over to everyone.

25 We actually originally entered into this, not from

1 the standpoint of really discovery, but from a response to a
2 request by the Defense to remove personal identifying
3 information from each drive, and -- and that -- so that is why
4 we said, "Well, you would know that better than we do, so why
5 don't you do it? And that, obviously, has not worked now.

6 So it -- it can be accomplished, and I do agree
7 we're probably in a better position to do that, the Government
8 is, and we can do that, but I -- I'm spending all this time
9 arguing for a couple of reasons.

10 One, because I don't believe that the Protocol
11 itself mandates that. And number two, we're concerned that if
12 we do this that somehow we're -- we're going to get
13 boomeranged by trying to follow the Court's order, then later
14 we expose ourselves to a *Brady* charge or later we expose
15 ourselves to an incomplete discovery charge, if, for example,
16 the Defense raises a Defense that is responded to in some way
17 by information that wasn't turned over.

18 So -- but with those caveats, I mean, I think we can
19 move forward. I -- I see where the Court is going. I -- I --
20 I understand --

21 **THE COURT:** I'm glad you do. I don't, but I have a
22 lot of questions around these issues. It seems to me that I'm
23 staring a bunch of search warrants that pretty clearly
24 suggested to the Magistrate Judge signing it that within a
25 reasonable period of time -- 60 days is the default, some --

1 maybe it's another two months after that -- at some point the
2 Defendants would have access to the stuff that say justify the
3 warrant.

4 And the other stuff that's not -- that lies outside
5 the scope of that warrant ought to be returned, ought to be
6 shielded from view by other Defendants who have no right to
7 it. It seems --

8 **MR. PARRELLA:** Well --

9 **THE COURT:** -- fairly straightforward.

10 **MR. PARRELLA:** -- a couple things. Number one, the
11 information was made available to them. I mean, they -- each
12 Defendant has access to their own hard drives that Mr. Aoki
13 has. So if it's talking about, as Mr. Nolan was talking
14 about, the information being separate from the actual machine,
15 they have access to that.

16 So if they had financial information that they
17 needed on that machine or, you know, tax information or
18 personal information, they could go and access that. That is
19 in compliance with the -- with the -- the Protocol, so -- so
20 that is satisfied.

21 The Protocol specifically talks about if the
22 Government is otherwise prevented by law to retain the items,
23 and these are items that the Government alleges -- these
24 machines, these hard drives, the originals, were utilized to
25 plan the DDOS attack and effectuate the DDOS attack so --

1 **THE COURT:** So on that issue, Mr. Parrella, is it
2 the Government's representation that each and every one of
3 these hundred-plus data storage units, hard drives, etcetera,
4 is an instrumentality?

5 **MR. PARRELLA:** I believe so. As I stand here, I
6 don't have a list in front of me, but I believe that is the --

7 **THE COURT:** Would you agree that if --

8 **MR. PARRELLA:** (Inaudible - - due to simultaneous
9 colloquy.)

10 **THE COURT:** -- one or more of these devices or -- or
11 storage units was not an instrumentality, there would be no
12 question you'd have to return them under the terms of the
13 Protocol itself?

14 **MR. PARRELLA:** Well, it depends because if -- even
15 if it were not an instrumentality -- in other words, let's say
16 there was a separate hard drive that wasn't used to plan the
17 attacks, to communicate about the attacks or to effectuate the
18 attacks, but it was used to store logs of the attacks or to
19 store IRC chat about it, then that circumstance I would have
20 an issue that it is not returnable, even though it's not an
21 instrumentality. We would be able to retain that in order to
22 -- to establish the authenticity of the -- of that item.
23 However --

24 **THE COURT:** Is -- is your authenticity argument
25 predicated on -- on a -- on a requirement that you have no

1 other way to authenticate the data other than to complete a
2 clean image and keep the original hardware?

3 Is that the standard I ought to be thinking about,
4 or is it simply that it's more convenient for the Government
5 to have the whole thing, and as long as it facilitates your
6 opportunity to authenticate that's a sufficient basis?

7 **MR. PARRELLA:** Well, I -- I don't know that I would
8 agree with either of those characterizations because it's not
9 that there's no other way. You know, we -- we -- there are
10 other ways.

11 **THE COURT:** Agents can come and agents can testify?

12 **MR. PARRELLA:** That's right.

13 **THE COURT:** Right.

14 **MR. PARRELLA:** But to us, we should be entitled to
15 prove our case in the way that we deem is best. This is the
16 best evidence. We don't know now. We don't -- we certainly
17 don't have any stipulations from the Defense to the
18 authenticity or the completeness of both the actual evidence
19 or of the search and the imaging procedures. In fact, Mr.
20 Nolan seemed to indicate that they were going to make motions
21 on that.

22 The best way to do that that I know of and I've only
23 been -- and -- is to bring in, if it really gets down to it --
24 "This is the computer that we seized from Defendant X," and we
25 can actually, you know, boot it up, put it on the screen. You

1 could see the logs right on that computer. That's the best
2 way to do it.

3 We shouldn't be restricted in that because, again,
4 we're in a circumstance if we -- if we don't have that, then
5 what prevents the Defense from saying, "Hey, guess what? They
6 made a poor image. This image is corrupted."

7 I guess if every Defendant stipulated, maybe we'd
8 have a slightly different argument, but that's the landscape
9 where we are right now.

10 So I don't want to belabor this, but I have to check
11 on Mr. Nolan's statement about whether the items are in EnCase
12 or not because I know we communicated -- and by "we," I mean
13 the actual agents who were transferring it -- specifically
14 with Mr. Aoki to make sure he could access these things in a
15 way that was satisfactory to him. Just to be clear, we're not
16 providing these hard drives to the Defense attorneys.

17 **THE COURT:** There's a -- there's a CDA in between
18 you.

19 **MR. PARRELLA:** Right.

20 **THE COURT:** I understand.

21 **MR. PARRELLA:** So I don't know what he's doing with
22 them. I -- I do know there is an issue that we've been
23 working with Mr. Aoki where I think, perhaps, the way Mr. Aoki
24 is imaging these hard drives is causing some difficulty, but I
25 -- I don't know that as I stand here for sure.

1 **THE COURT:** All right. Thank you, Mr. Parrella.

2 **MR. PARRELLA:** So thank you.

3 **THE COURT:** Mr. Nolan or anyone else want to offer a
4 brief rebuttal?

5 **MR. LEEMING:** Peter -- Your Honor, Peter Leeming for
6 Mr. Collins.

7 There's been a suggestion at the hearing before
8 Judge Jensen that resulted in the comments that have been
9 quoted were some kind of an afterthought. That's not true.

10 There was -- I had conversations with Mr. Aoki.
11 This issue became apparent early that it was going to be
12 problem, and Judge Jensen made what I perceived to be an order
13 returning property and ordering the Government to segregate
14 out relevant data.

15 There's really two issues that I think the
16 Government is bringing up here. One is the issue of
17 authenticity. That is separate from identifying the data that
18 needs to be used to prosecute this conspiracy case.

19 This isn't a situation where everybody is charged
20 individually. This is a situation where conceivably other
21 Defendants' information can be used against my client's, but
22 we've had privacy concerns raised by everybody that they don't
23 want the entire contents of their hard drive shared with
24 everybody. So I mean, that's one.

25 Second is the volume of the data is tremendous.

1 It's huge.

2 So I do think that it's incumbent upon the Defendant
3 to identify what it is they think is pertinent to this case.
4 I think the authenticity issue is kind of a red herring. I
5 think it can be addressed other ways, and that's my comment.

6 **THE COURT:** All right.

7 **MR. LEEMING:** Thank you.

8 **THE COURT:** All right. Thank you, Mr. Leeming. Mr.
9 Nolan.

10 **MR. NOLAN:** Just very briefly. Counsel never did
11 address your questions, in my opinion, on the issue of what
12 about the multi-Defendant aspect of this.

13 And I think it would be -- you know, you can look at
14 it separately. If it was single Defendant, take the computer.
15 I'd be in Court saying "Return to me the items." We'd go
16 through that whole issue, and I'd say, "Well, wait a second.
17 I need -- are you going to require me to suppress my
18 photographs of family?"

19 "No."

20 "Are you going to -- am I going to have to come into
21 court on that or don't you have a duty pursuant to your
22 representation to the -- to the Magistrate?"

23 I mean, these rules have only started to be -- be
24 worked on in the last, you know, five or ten years. The idea
25 of -- you know, and in terms of go in, take a huge amount of

1 material because it's easy. It's there. It's stored.

2 And then -- then sit on it basically, and then
3 basically say "Well, we'll find what we want to find. We'll
4 put it in -- we'll analyze it, but we don't have any duty to
5 kind of go back and return what we shouldn't have taken in the
6 first place, what we're not entitled to take in the first
7 place. And the only reason we're entitled to take it is
8 because the Magistrate said as a practical matter we'll let
9 you take things you're not otherwise entitled to because
10 you're going to return it, because you're going to do the due
11 diligence outside of that person's house rather than inside
12 that house."

13 That's the thing that seems to be lacking in the
14 first argument.

15 The second argument is we made no agreement
16 regarding how these things would be handled. We basically
17 told Mr. Aoki, most of us, I think all of us said, "Hey, I
18 appreciate you getting our hard drive so we can take a look at
19 it, but I'll be -- I don't want you to give this to somebody
20 else." I said, "They're not entitled to it."

21 And I don't want to disseminate something which may
22 have been -- should maybe be suppressed because then I'm
23 waiving that. You know, I -- I'm giving up that information.
24 I can't do that and --

25 **THE COURT:** Mr. Nolan, if the Government takes on

1 this burden, and it's a burden I believe under your argument
2 they take on. I'm not saying how I see this yet.

3 But if the Government were to take this burden on
4 and make a mistake, right, and to, for example, allow access
5 to your client's personal medical history or issues regarding,
6 you know, family tax planning, things of that nature.

7 **MR. NOLAN:** Right.

8 **THE COURT:** What remedy would there be? What relief
9 would the -- would -- would -- would you be entitled to under
10 that situation where you're -- you are for -- you are telling
11 the Government you want them to do this, and yet when they
12 make a mistake who bears the burden of that mistake? That's
13 what I'm trying to get at.

14 **MR. NOLAN:** Yeah. I guess I don't look at it as I'm
15 telling the Government what I want them to do. I'm telling
16 the Government what I think they have to do.

17 **THE COURT:** You're asserting --

18 **MR. NOLAN:** Yeah, I'm asserting my right --

19 **THE COURT:** -- what you believe are your client's
20 right.

21 **MR. NOLAN:** -- to have them do that.

22 **THE COURT:** Yeah. Sure.

23 **MR. NOLAN:** And quite frankly, it is their duty to
24 do well because they are taking material that is completely
25 irrelevant that the Magistrate Judge would not have allowed

1 them to take that otherwise they would have had a special
2 master so we could have claimed attorney-client privilege or
3 some other kind of privilege on the materials, and it is their
4 duty to do that.

5 And -- and I think that the way -- I mean, who
6 knows. If -- if they're worried about something in the call
7 they're making on a particular thing, you know, maybe
8 protective orders are a way to -- to work on that so that --
9 so we all have to sign kind of protective order so that the
10 taint doesn't get dissipated unnecessarily, you know. So it
11 doesn't become an automatic we can't stop the taint because
12 we've released it to the -- the discovery master, something
13 like that. I mean, those -- those possibilities might be able
14 to be worked out.

15 **THE COURT:** I take it that you're -- you're of the
16 view that in urging or asserting this right that you believe
17 your client has, you're not in any way waiving your further
18 right to challenge the Government under *Brady* or otherwise
19 down the road, right?

20 **MR. NOLAN:** No. I am not waiving anything. And by
21 the way, we did not agree to anything that counsel said in
22 terms of there was no agreement.

23 But no, I'm not waiving anything because I still am
24 allowed to go in and move to suppress, move to -- move to
25 suppress, move to -- move to make whatever motions are

1 appropriate, but I'm entitled to this. In other words, this
2 is -- you know, it isn't -- it isn't like oh, if I get this
3 then I give something else. You know, I can't do that.

4 **THE COURT:** All right.

5 **MR. NOLAN:** All right.

6 **THE COURT:** I think I understand your views.

7 **MR. NOLAN:** Thank you.

8 **THE COURT:** All right.

9 **MR. NOLAN:** All right.

10 **MR. COHEN:** Judge, could I just add one very --

11 **THE COURT:** Sure, you can, Mr. Cohen. Go ahead.

12 **MR. COHEN:** I just thought -- and I'm not suggesting
13 that the Government is being disingenuous with this, but I
14 found it interesting that in comparison to a wiretap case
15 where they have thousands of hours of wires and they choose to
16 use two calls.

17 Well, there's an old foundation to this
18 "minimization." The thousands of hours that they have should
19 have and, indeed, must pass the minimization requirements in
20 the first instance, leaving the Government with a thousand
21 hours of relevant probative information, which allows them to
22 pick five minutes.

23 We don't have minimization here. We have the vacuum
24 cleaner at work. They came in. They took everything. Some
25 of it's relevant, most of it is not. And it's a difficult

1 concept and it's evolving, but let's -- let's apply the
2 concept of minimization after the fact, and I think that's
3 what Judge Jensen was speaking to when he discussed the
4 matter.

5 **THE COURT:** All right. Thank you. Motion to submit
6 it. I will issue an order very shortly on this subject after
7 the hearing.

8 Let's turn to some of the other issues that remain
9 on our agenda. I'd next like to talk about the Pretrial
10 Service proposal for modification of the -- what I'll call the
11 inspection requirement.

12 I believe this is captured Ms. Valenzuela's
13 objection at docket 191. I know there, again, were a number
14 of joinders filed, but I'd like to hear from the Defendants,
15 their arguments. Mr. Whelan, I suspect --

16 **MR. WHELAN:** Your Honor, if I could suggest --

17 **THE COURT:** -- you're in a good position to address
18 this, so why don't you go ahead.

19 **MR. WHELAN:** -- we've tentatively agreed on kind of
20 a tiering of how to deal with this -- this issue.

21 **THE COURT:** All right.

22 **MR. WHELAN:** And we tentatively agreed that I would
23 go first on behalf of Mr. Cooper --

24 **THE COURT:** All right.

25 **MR. WHELAN:** -- because it was Mr. Cooper's bail

1 violation notice in December -- December 20, 2012 that got
2 this issue rolling, if I may?

3 **THE COURT:** I'll just note for the record that I
4 believe that Mr. Cooper's response is at docket 202. Why
5 don't you go ahead.

6 **MR. WHELAN:** And that is correct. And in essence,
7 as I said in my moving papers, Mr. Cooper's issue essentially
8 has been settled.

9 Pretrial Services in Mobile, Alabama, the Southern
10 District of Alabama has scanning software that they received
11 from an USDOJ Law Enforcement Forensics Unit that's loaded
12 with free software that -- and training is provided by US --
13 this USDOJ Center.

14 The Pretrial Services officer came to Mr. Cooper's
15 house, inserted the thumb drive into his USB port, ran the
16 scan. It took about an hour and a half. The first scan takes
17 a long time.

18 Mr. Robbins, the Pretrial Services officer, has
19 educated me a little bit since the last court date. I've
20 spoken with Mr. Carranza about that. And, you know, the next
21 scan that occurs is expected to take ten or 15 minutes because
22 it only dates back to the first scan, which takes a long time.

23 **THE COURT:** It's looking at the incremental change
24 in the history?

25 **MR. WHELAN:** Exactly.

1 **THE COURT:** Right.

2 **MR. WHELAN:** That initial scan retained a log of the
3 deleted files that Pretrial can look at, the Government can
4 look at. My client on his computer also has a log of those.
5 He's sent it to me. I've offered it to the Government. So
6 Pretrial in Alabama continues to have that software and
7 continues to be able to monitor Mr. Cooper's compliance.

8 And so it's my understanding through discussions
9 with -- with Mr. Carranza that specifically as to Mr. Cooper
10 and this issue, it's -- not an issue anymore.

11 The only additional thing that the Government and I
12 talked about is inserting into condition 4 of his Pretrial
13 release condition that he shall "not" then insert
14 "intentionally delete internet history," etcetera. Having
15 said that, I think Mr. Cooper's issue is resolved.

16 The larger issue of whether other Pretrial Services
17 offices, you know, should be --

18 **THE COURT:** Not Mr. Cooper's problem, I understand.

19 **MR. WHELAN:** -- doing the same thing. I'm
20 certainly, you know, presented that as an option, and -- but
21 I'm not -- yeah, I don't think that issue is involved.
22 Pretrial is still investigating it and trying out software,
23 and maybe Mr. Carranza can make --

24 **THE COURT:** All right. Well --

25 **MR. WHELAN:** Yeah, if we could --

1 **THE COURT:** I want to hear from Pretrial, of course
2 --

3 **MR. WHELAN:** Yeah.

4 **THE COURT:** -- and the Government as well on this
5 issue.

6 Are there any -- as to Mr. Cooper and as to this --
7 I'll call it suggestion that all of the districts rely upon
8 this thumb drive with the scanning software -- does any -- do
9 you wish to add any further -- does anybody else want -- wish
10 to speak on that subject because I think I understand what
11 you're saying pretty clearly?

12 **MR. WHELAN:** I -- I think there is general --
13 there's -- there's more issues on the global monitoring issue
14 that other Defense lawyers may want to be heard on this
15 scanning issue.

16 I know there's -- there's unanimous opposition to
17 inserting software on to the client's computer and having the
18 Defendant pay a monthly fee to have a third party agency
19 monitor his computer use. I -- I -- we will all object to
20 that, and that's not necessary for my client because Pretrial
21 already has the ability in Mobile to do what's necessary.

22 I would ask the Court, after hearing from the
23 Government and Pretrial, to deem Mr. Cooper's issue settled
24 with the addition of the word "intentionally" into condition -
25 - sentence one of condition 4.

1 **THE COURT:** All right. Thank you, Mr. Whelan. Mr.
2 Leeming?

3 **MR. LEEMING:** Yeah, just quickly, Your Honor. Peter
4 Leeming for Mr. Collins.

5 The -- the problem that Mr. Collins faces, and is
6 also a separate violation for him, is that he refused to sign
7 a computer restriction and monitoring program participant
8 agreement, which is used in the district where he lives.
9 Apparently, they do not use anything else other than to
10 install intrusive monitoring software on computers.

11 **THE COURT:** Mr. Collins is in the Northern District
12 of Ohio; is that correct?

13 **MR. LEEMING:** I believe so.

14 **THE COURT:** All right. Is that correct?

15 **MR. CARRANZA:** Correct.

16 **MR. LEEMING:** Yes. And so I have a copy of that
17 here. It's a very intrusive agreement, and that is what he
18 did not sign. I think there is a need for uniformity as --

19 **MR. CARRANZA:** Oh, thank you, Your Honor.

20 **MR. LEEMING:** -- best as we can do in these
21 situations.

22 **THE COURT:** Well, I'm sure that you would agree, Mr.
23 Leeming, my challenge is on the one hand I'm being encouraged
24 to consider uniformity. On the other hand, my Circuit and
25 others have directed me to consider each individual

1 Defendant's situation specifically, so there's a bit of a
2 tension between those two positions.

3 **MR. LEEMING:** I understand that.

4 **THE COURT:** So except, I suppose, if I were to raise
5 to the bottom and adopt the one condition that any district
6 could apply across the board, even if there were other
7 districts that were able to take a more surgical approach to
8 this. But I understand your view. That's -- you're -- you're
9 speaking on behalf of Mr. Collins. All right.

10 So what I've been handed then is a -- is an
11 agreement, which is a requirement of the Northern District of
12 Ohio?

13 **MR. LEEMING:** That's my understanding, Your Honor,
14 yes.

15 **THE COURT:** All right. Do you wish to add anything
16 further, Mr. Leeming?

17 **MR. LEEMING:** No, except that we object to it and
18 it's -- it would --

19 **THE COURT:** I take that from your remarks, yeah.

20 **MR. LEEMING:** I -- my view is when I saw this, it
21 was inconsistent with the initial order that Your Honor made.
22 It was inconsistent with other agreements that people were
23 reaching with their individual Pretrial Services, and I don't
24 think it's appropriate here.

25 **THE COURT:** All right. Thank you, sir. Mr. Cohen?

1 **MR. COHEN:** If I may? And I'm speaking, I think, on
2 behalf of all of the Codefendants, as well as those who are
3 not here today.

4 And I've had some discussions with the Government,
5 and we think the Government's request -- heaven forbid I be
6 accused of saying the Government is being reasonable -- but I
7 think the Government's request that we provide Pretrial
8 Services with an opportunity to examine and to explore whether
9 this thumb drive attachment system will resolve this is
10 reasonable.

11 I've spoken to the Pretrial people in Vegas, and
12 although it's not a system that they use or have, when I
13 explained to them or spoke to them on the basis of what co-
14 counsel told me this system was about, they didn't seem to be
15 terribly upset by it. It seems to be simple enough and it
16 seems to be available.

17 So I think our position is with regard to this thumb
18 drive system is we would respectfully request that Your Honor
19 grant and join in with the Government's position -- Pretrial
20 Service a reasonable opportunity to see if it will work and
21 how so, see if there are any additional problems, and in the
22 interim maintain the status quo ante.

23 And it seems to me with the insertion of
24 "intentional," which we all agree on, in the interim that's
25 something we can live with now on behalf of all of the

1 Defendants. That sort of, I think, give all the sides that we
2 need at this point.

3 **THE COURT:** All right. Unless anyone else from the
4 Defense wishes to address this issue, I'd like to hear from
5 Mr. Parrella and, of course, Pretrial as well.

6 Mr. Parrella, why don't you go first.

7 **MR. PARRELLA:** So I wanted to bask in Mr. Cohen's --

8 **THE COURT:** Reflective glow?

9 **MR. PARRELLA:** -- acknowledgment of -- that I'm
10 reasonable. But first of all, on the issue of inserting the
11 word "intentional," we don't have any problem with that. That
12 --

13 **THE COURT:** All right.

14 **MR. PARRELLA:** That's fine by us.

15 **THE COURT:** Well, since we're all in agreement on
16 that one, let me just note on the record I'm going to grant
17 that joint request, as I style it, and ask that a modification
18 be drafted that I can sign, which adds the word "intentional"
19 to the condition 1 in each of the release orders, so let's --
20 let's go forward.

21 **MR. PARRELLA:** Okay.

22 **MR. COHEN:** It's condition 4.

23 **THE COURT:** It's condition 4. Thank you.

24 **MR. PARRELLA:** Thank you, Your Honor.

25 **THE COURT:** I apologize.

1 **MR. PARRELLA:** I -- I have two other comments, one
2 on the technological fix suggested. And the Government --
3 assuming that this thumb drive does what it is -- claims that
4 it will do, which is to identify deletions and scan it,
5 assuming that it does that in the manner in which it's
6 advertised, we really don't have any objection to that, I
7 think, as far as this district.

8 Your Honor ordering other --

9 **THE COURT:** There's an issue --

10 **MR. PARRELLA:** -- Pretrial Services in --

11 **THE COURT:** -- of my authority to do this. I
12 understand that.

13 **MR. PARRELLA:** I think that, quite frankly, you can.
14 I think that while there may be issues about exactly the
15 manner in which certain conditions are effectuated by Pretrial
16 Services, I think, in this particular case, if it's made
17 extremely clear then, honestly, I think it's up to Pretrial in
18 the other districts to abide by the order.

19 And if they can't, then I guess we need to somehow
20 address it if they're saying that they physically cannot.
21 This doesn't seem to fit into the "cannot" category so --

22 **THE COURT:** All right.

23 **MR. PARRELLA:** -- I'll let you (Inaudible - - due to
24 simultaneous colloquy.).

25 **THE COURT:** All right. I think I understand the

1 Government too.

2 Mr. Carranza, or -- would someone from Pretrial like
3 to speak to this?

4 **MS. FARAHMAND:** Your Honor, I would like to start by
5 where we started with Mr. Whelan.

6 One correction that I would like to make, in the --
7 in the report by Officer Carranza dated January 31st, the
8 second page, second paragraph on line 5, it should actually
9 state "Mr. Archer," not "Mr. Whelan." So this --

10 **MR. WHELAN:** Thank you.

11 **MS. FARAHMAND:** So this -- this began with not Mr.
12 Whelan's case, but a separate case for -- that Mr. Archer is
13 (Inaudible -- due to simultaneous colloquy.)

14 **THE COURT:** Could you remind me who Mr. Archer
15 represents --

16 **MS. FARAHMAND:** Yes.

17 **THE COURT:** -- or perhaps Mr. Archer --

18 **MS. FARAHMAND:** Ethan -- Ethan Miles.

19 **THE COURT:** Thank you.

20 **MS. FARAHMAND:** So that is how this all began, just
21 to clarify that to the Court.

22 **THE COURT:** Right. This is the District of Arizona?

23 **MS. FARAHMAND:** Correct.

24 **THE COURT:** Okay.

25 **MS. FARAHMAND:** Additionally, with Mr. Whelan's

1 case, or Defendant Cooper, I have spoken to the Southern
2 District of Alabama. I also want to clarify something with
3 that as well.

4 That district specifically as a whole does not use
5 this program. The only person that does use this program is
6 the officer that is monitoring this Defendant.

7 It is not a protocol that the whole district uses,
8 and he has actually -- the only reason why he uses it is
9 because he brought it on. He was trained in this program on
10 the state level, and then when he came to this district --
11 that district (Inaudible - - due to simultaneous colloquy.)

12 **THE COURT:** So he had particularly expertise --

13 **MS. FARAHMAND:** Exactly.

14 **THE COURT:** -- that allowed him to participate?

15 **MS. FARAHMAND:** Yes.

16 **THE COURT:** I understand. Okay.

17 **MS. FARAHMAND:** So that's -- that's what I wanted to
18 clarify. I will let Mr. Carranza speak to the thumb drive
19 itself.

20 **THE COURT:** All right. Mr. Carranza.

21 **MR. CARRANZA:** Good morning, Your Honor.

22 **THE COURT:** Good morning.

23 **MR. CARRANZA:** I was able to obtain a copy of the
24 thumb drive software that they spoke. I used it yesterday,
25 played with it yesterday, and I found a significant glitch in

1 the system. It's something we're still reviewing, but it --
2 the glitch that I found is very significant and it would cause
3 us concern.

4 Our district -- our office is still going to look
5 into the matter and see if it can be resolved or something I
6 did wrong. I have not -- I have not been trained in the
7 system. I watched a video.

8 And I believe I provided some information to the
9 Court yesterday, so it's something I cannot recommend that we
10 will do or that's something we can implement in the future.
11 We don't know enough about the system.

12 **THE COURT:** Well, I -- I appreciate that. It seems
13 to me that in light of your update, we ought to give Pretrial
14 Services at least some time to complete its assessment.
15 Perhaps it is operator error. I'm certainly guilty of that on
16 more than one occasion. So I -- I -- it -- what I'd like to
17 do is the following:

18 Let's keep the status quo. I'd like to Pretrial
19 another ten days to evaluate this. Do you think you need more
20 time than that, Mr. Carranza?

21 **MR. CARRANZA:** Well, Your Honor, I -- in order to be
22 properly trained, I need to contact somebody from --

23 **THE COURT:** All right.

24 **MR. CARRANZA:** -- the agency that provides the
25 service so we can get somebody to come out and actually --

1 other than just the basic video that -- it -- it might take
2 longer.

3 **THE COURT:** Why don't we set this for two weeks. If
4 you can report back to me that you're having difficulties
5 meeting that deadline, I'll certainly consider that.

6 **MR. CARRANZA:** We can --

7 **THE COURT:** I'd like to just have something on the
8 calendar to keep this proceeding.

9 **MR. CARRANZA:** That -- that's fine, Your Honor.

10 **THE COURT:** Okay.

11 **MR. CARRANZA:** But our -- our biggest concern is we
12 -- meaning U.S. California Pretrial -- is looking into this
13 matter. There's 14 Defendants, 11 districts that supervise
14 that Defendants that the Defendants live outside of our
15 district, one of them being the Northern District of Ohio.

16 Some of these districts -- I believe some of the
17 districts already have policies and procedures in order -- I
18 mean, who's monitoring software or how they can -- how do they
19 implement this condition.

20 Those conditions or that policy and procedure has
21 been adopted by their district. It might have been approval
22 with their court, approved by their chief. Our concern is
23 we're going to be asking a district somewhere else outside of
24 Northern District of California to follow this Protocol.

25 There's four districts that don't have a policy or

1 procedure or implement monitoring software. They don't use it
2 at all. They -- all they do is do a manual search of the
3 computer.

4 And for those districts, they will have to implement
5 the policy and procedure and also obtain their court's
6 approval or information from the court what their positions
7 are.

8 So it might -- is that something that can be done
9 fast. It's going to take some time to determine if this
10 software would work and whether the 11 districts outside
11 Northern District of California are willing to use it.

12 **THE COURT:** I appreciate that. I'd -- I'd -- what
13 I'd ask in light of all that that is that, you know, over the
14 next two weeks you and your office do your best to investigate
15 whether this option is -- is feasible here in Northern
16 California and each of the other districts.

17 Candidly, if the report back from Pretrial is they
18 have been unable to confirm or verify that certain districts
19 are able to participate in this option, then I think we just
20 have to take that at that point as a given and fashion either
21 a new requirement or a new inspection protocol or something
22 altogether different in order to address the issue.

23 But I would like to set this for two weeks out to
24 give your office a fair and full opportunity to do the best
25 you can to figure out what is possible.

1 In the meantime, we'll keep things as they are. I
2 think that will preserve the situation for the Defense and
3 Government under conditions that were originally agreed on by
4 you all, I'll add, and we'll -- we'll see where we are in a
5 couple weeks.

6 Mr. Whelan, you wish to address this?

7 **MR. WHELAN:** It sounds like the issue has to do with
8 four districts, not 11.

9 **THE COURT:** That may be. I --

10 **MR. WHELAN:** If there are issues with other
11 districts that have scanning capabilities, if some of the
12 Defendant lawyers are not comfortable with it, I'm confident
13 you'll hear about it --

14 And, you know, we're not asking that every district
15 supplant -- districts that already have a monitoring process
16 supplant it with this thumb drive. I think the issue is that
17 districts that don't have it.

18 **THE COURT:** Right.

19 **MR. WHELAN:** And whether the thumb drive is a
20 reasonable, simpler way to do it, and that's being
21 investigated.

22 **THE COURT:** Well, let's -- let's see what we learn
23 after a couple weeks. I think we'll keep the situation as it
24 is for the time being, and it's my hope that we're able to
25 move forward.

1 From what I've heard, it doesn't strike me as a huge
2 technological barrier to overcome, but, you know, I don't
3 always see every obstacle out there in implementing a policy.

4 So I'll look forward to hearing from you in a couple
5 weeks, Mr. Carranza.

6 **MR. CARRANZA:** Thank you, Your Honor.

7 **THE COURT:** Thank you, sir. All right.

8 Let's next turn to the issue raised by Mr. Kershaw.
9 It is Mr. Kershaw's motion?

10 **MR. FIGUEROA:** Yes, Your Honor.

11 **THE COURT:** Regarding --

12 **MR. CHEW:** Oh, Your Honor, just --

13 **THE COURT:** Yes, sir.

14 **MR. CHEW:** Real quickly, just -- just to clarify.

15 **THE COURT:** Mr. Chew.

16 **MR. CHEW:** So will there be another, I guess, status
17 conference before this Court in two weeks, or is it -- is the
18 two weeks the deadline for Mr. Carranza to report to the
19 Court? I just wanted to clarify.

20 **THE COURT:** Well, I appreciate your clarifying that,
21 and in light of the logistics required to have you all appear,
22 I am in my mind thinking of a report from Mr. Carranza in --

23 **MR. CHEW:** Okay.

24 **THE COURT:** -- two weeks, and then we'll see if we
25 need to reconvene.

1 **MR. CHEW:** Yeah, because I -- I thought --

2 **UNIDENTIFIED SPEAKER:** (Inaudible - - due to
3 simultaneous colloquy.)

4 **MR. CHEW:** -- that would make sense -- it would make
5 sense, Your Honor, because --

6 **THE COURT:** All right. Thank you for clarifying
7 that, Mr. Chew. All right.

8 So just -- again, just so my record is clear here,
9 I'm referring to Mr. Kershaw's motion at docket 174. Let's
10 talk about Twitter and IRC. Mr. Figueroa, go ahead.

11 **MR. FIGUEROA:** Yes, Your Honor. We believe that the
12 proper analysis is strict scrutiny analysis. It seems that
13 the People are arguing that the conditions are reasonable, and
14 that's a rational basis approach, and that's wholly
15 inappropriate when a federal court is considering First
16 Amendment issues.

17 So we ask the Court to employ a strict scrutiny
18 analysis and hold the Government to its burden of first
19 establishing a compelling governmental and, second, showing
20 it's narrowly tailored.

21 **THE COURT:** And what basis are you invoking the
22 strict scrutiny standard? I don't see, for example, content
23 element to this restriction. Is there some other basis you're
24 relying upon?

25 **MR. FIGUEROA:** Yes, Your Honor. It's core political

1 discourse. We did submit some proposed tweets from Mr.
2 Kershaw where he wants to engage in political discourse. The
3 Chief Executive Barack Obama only communicates his Twitter
4 through Twitter, and there's no other way to access it.

5 I guess the prosecution's position is that maybe Mr.
6 Kershaw can glean secondhand from news reports the President's
7 tweets, but that is not an adequate substitute.

8 So we believe that strict scrutiny is required
9 because we're talking about political discourse, the core of
10 the First Amendment.

11 **THE COURT:** Do you have any thoughts, counsel, about
12 how I might narrowly craft or tailor this restriction? For
13 example, would you suggest your client be permitted to access
14 tweets using certain hash tags but not others?

15 Is there some way we can focus on what you're
16 entitled to without impinging upon the Government's legitimate
17 concerns here?

18 **MR. FIGUEROA:** Yeah, that's a possibility. To allow
19 him to certainly access the tweets issued by the Presidential
20 candidates in the Presidential contest, but I don't know if
21 the hash tags --

22 **THE COURT:** I'm just --

23 **MR. FIGUEROA:** My understanding.

24 **THE COURT:** -- brainstorming out loud here.

25 **MR. FIGUEROA:** Yeah.

1 **THE COURT:** It seems to me what you're saying is
2 whatever way we cut this your position and, I take it from the
3 joinder, a number of the Defendants' position is an absolute
4 blanket ban is not appropriate and you'd like to see some
5 opportunity for participation?

6 **MR. FIGUEROA:** Yes, Your Honor. We believe a
7 categorical -- categorical prohibition is inappropriate.

8 I tried to negotiate with the Government to come up
9 with some sort of compromise where he could have narrowly
10 tailored conditions that would still allow Mr. Kershaw to --

11 **THE COURT:** I take --

12 **MR. FIGUEROA:** -- engage in political discourse.

13 **THE COURT:** -- it those discussions we're fruitful?

14 **MR. FIGUEROA:** They were not.

15 **THE COURT:** All right. All right. From the
16 Government, who wants to speak to this, Mr. Chew?

17 Thank you, Mr. Figueroa.

18 **MR. CHEW:** Well, thank you, Your Honor. I think a
19 couple things need to be considered.

20 First of all, the Court should note that these are
21 not conditions that the Government unilaterally imposed upon
22 the Defendants. These are conditions that the Defendants
23 negotiated, you know, with -- with the Government and agreed
24 to so --

25 **THE COURT:** And with the Court essentially.

1 **MR. CHEW:** And -- and --

2 **THE COURT:** -- right?

3 **MR. CHEW:** Yes. The -- the Defendants agreed --
4 most Defendants, except for Mr. Kershaw, agreed twice, both on
5 the record in court and in the stipulations.

6 Second, we -- the Government doesn't believe that
7 the current restrictions against Twitter and the IRC violate
8 or infringe upon the First Amendment.

9 They don't restrict the Defendants' ability to
10 express his views on -- on the political discourse. They
11 don't -- they don't endorse or sensor a particular point of
12 view. They're content -- they're content neutral, so it's the
13 Government's position is strict scrutiny is not appropriate in
14 -- in -- in -- in this case.

15 The Government -- the Defendants -- I'm sorry,
16 strict scrutiny is usually applied to laws, ordinances,
17 regulations and policies. The Government is unaware of any
18 case where strict scrutiny is applied to a -- to a term of
19 pretrial release.

20 Even -- even if strict scrutiny did apply, the --
21 the restrictions are narrowly tailored to meet a compelling
22 Government interest. The Government did not seek to -- to
23 limit any use of computers. The Government did not seek to --
24 to limit internet use -- you know, to ban internet use if you
25 ban the use of computers. In that sense, they are narrowly

1 tailored.

2 The Defendant has multiple avenues to -- to express
3 his political opinion or, you know, to -- to communicate with
4 others. He's got chat rooms. He's got political blogs. He's got
5 email. There are a number of viable alternatives.

6 And as for the compelling Government interest, the
7 Anonymous Group communicates through IRC and through Twitter.
8 The Anonymous Group sends out its information, coordinates its
9 plans through -- you know, through -- through -- through those
10 means.

11 If -- if the Court were to cut off the Defendants
12 from IRC and Twitter, the Courts would be cutting off -- the
13 Courts would be cutting off the Defendants from their flow of
14 information and communication from Anonymous, and that's what
15 the Government is seeking. That is the compelling Government
16 interest.

17 Now, if the -- if the Court were to adopt the
18 Defendants' point -- the Defendants' kind of point of view as
19 to the broadness of the constitutional rights versus the
20 court's power, the Court would be negating a large part of its
21 own power because under the Defendants' interpretation, the
22 Court wouldn't be able to fashion, for example, a condition
23 limiting who the -- who the Defendant would associate with
24 because that would, you know, infringe upon their First
25 Amendment right of --

1 **THE COURT:** Right. Presumably, for example, if I
2 have a restriction and a release order that says the Defendant
3 can't talk to a Codefendant that would, by definition,
4 restrict their ability to talk about the President, other
5 candidates for the office and so forth, and yet we do that all
6 the time.

7 **MR. CHEW:** Yes.

8 **THE COURT:** Right?

9 **MR. CHEW:** That's -- that's correct, Your Honor.
10 And so the Government believes that these -- these
11 prohibitions against the use of Twitter and the IRC are
12 appropriate restrictions.

13 **THE COURT:** All right. Thank you, Mr. Chew.

14 Any -- any rebuttal, Mr. Figueroa?

15 **MR. FIGUEROA:** Yes, Your Honor. The Government
16 proffers no particularized evidence against Mr. Kershaw
17 showing that he personally has misused or improperly used
18 either Twitter or IRC, yet the Government wants to ban him
19 categorically from those modes of expression.

20 There's no concrete or particularized evidence
21 against Mr. Kershaw. That's one of the factors that's
22 enumerated in 3142(g)(2). It's the weight of the evidence
23 against the person.

24 Instead the Government brings up this nebulous group
25 of unknown others, the Anonymous Group, and says the Anonymous

1 Group does this and, therefore, Mr. Kershaw must be banned
2 from IRC and Twitter, but there's no evidence against Mr.
3 Kershaw.

4 And without a proffer that's concrete as to Mr.
5 Kershaw, the weight to -- of the evidence against Mr. Kershaw
6 is minimal.

7 **THE COURT:** So Mr. Figueroa, you -- you present a
8 number of compelling arguments. It would seem to me, though,
9 that all of these arguments could have been, and perhaps were,
10 presented earlier.

11 In order to reconsider or modify conditions of
12 release there has to be something new, would you agree, for
13 the Court to consider or to deliberate on? What's new in all
14 of this? What's changed between when I first imposed these
15 conditions and today?

16 **MR. FIGUEROA:** For Mr. Kershaw, he accepted the
17 conditions initially so that he could have access to a
18 computer, but we did notify the Government that we reserved
19 the right to dispute the First Amendment issues, and we did
20 bring it up in due course.

21 We have never forfeited that argument. We have
22 always objected to the First Amendment issue, but we did agree
23 initially so that we could get a better grasp on the evidence
24 to see if -- if the Government did have concrete evidence
25 of --

1 **THE COURT:** Your point is you haven't seen anything
2 yet?

3 **MR. FIGUEROA:** That's right.

4 **THE COURT:** All right. I think I understand your
5 position.

6 **MR. CHEW:** Well, Your Honor, if the --

7 **THE COURT:** Go ahead, Mr. Chew.

8 **MR. CHEW:** -- Defense would like, you know, evidence
9 concerning Mr. Kershaw's use of IRC, they only have to refer
10 to the search warrant of his premises where -- I'm sorry, not
11 the search warrant. They only have to report to -- I'm sorry.

12 They only have to refer to certain reports where Mr.
13 Kershaw did provide IRC logs from his computer, I think, that
14 were related to -- to -- to the -- to Anonymous.

15 **THE COURT:** All right.

16 **MR. FIGUEROA:** But, Your Honor, where -- where's the
17 evidence about Twitter? You know, there's no -- no -- no
18 mention of Twitter whatsoever.

19 **THE COURT:** All right. I think I understand your
20 views.

21 Mr. Nolan, do you wish to speak on behalf of your
22 clients?

23 **MR. NOLAN:** Only -- only to -- only to add that --
24 that for -- for those of us that are a little older, we didn't
25 have -- I didn't have any idea how important Twitter was. I'm

1 going to have to learn how to use Twitter, and when I agreed
2 to it I certainly didn't have an appreciation for Twitter.
3 Now, I do because it seems like I'm going to have to learn it.

4 So the agreements made, you know, at the time
5 without being well thought out, and certainly the Twitter one,
6 at least -- you know, I'll claim ineffective assistance of
7 counsel, if I'd thought it out, thought well, maybe now I have
8 to learn Twitter. So you know, we think these things
9 through --

10 **MR. CHEW:** Could we get that --

11 **MR. NOLAN:** Yeah.

12 **MR. CHEW:** I'd like that transcript, actually.

13 **MR. NOLAN:** Exactly. Exactly. So -- so I mean,
14 that -- that is the change.

15 **THE COURT:** No. I understand.

16 **MR. NOLAN:** You know, as we get together, people
17 coming from all over, and -- and -- and I just -- I guess I
18 may have to learn Twitter.

19 **THE COURT:** All right. Thank you.

20 **UNIDENTIFIED SPEAKER:** Your Honor, if I may because
21 I took the lead of the Defendants when we negotiated.

22 You know, the Government and the Defense spent a lot
23 of time and effort, weeks, reaching what we believed to be a
24 reasonable resolution. I'd be the first to admit that in
25 dealing with it, as with my colleague, slipped right through

1 it.

2 We now know that even things have proven workable
3 for six months that there's now been an application to rewrite
4 it by Pretrial Services. And I think very much the same
5 position that now we've had an opportunity to see this, and
6 counsel have had an opportunity to reflect upon and start
7 looking at the evidence, so they'd like to be in the same
8 position to ask the Court to consider it.

9 To the extent that people are now being forced with
10 a waiver -- it was a waiver on my part initially, and again,
11 it was done with the best of intention to facilitate this and
12 move this along.

13 And just as there are claims that certain things are
14 not working in certain respects and the Court is revisiting it
15 -- revisiting it, so, too, I -- I respectfully suggest the
16 same standard should apply in terms of those.

17 **THE COURT:** All right. I understand your view. All
18 right. That -- that matter is submitted. I will, again, rule
19 shortly.

20 Let's turn to -- unless I'm overlooking something, I
21 believe we need to address some specific issues for particular
22 Defendants and their bail conditions.

23 I'm referring to Mr. Collins, and I'm looking at
24 you, Mr. Leeming.

25 **MR. LEEMING:** I see that, Your Honor.

1 **THE COURT:** I understand Mr. Collins is on by
2 telephone, if that -- Mr. Collins, are you there, sir?

3 **DEFENDANT COLLINS:** Yes, sir.

4 **THE COURT:** All right. Welcome.

5 Mr. Leeming, why don't you speak to the violations
6 that have been alleged.

7 **MR. LEEMING:** Yes. There's -- there's two
8 violations, Your Honor. The second one, I think, is the
9 easiest, which is, "Furthermore, Mr. Collins is refusing to
10 provide information about his computer, which has prevented
11 the supervising office from inspecting his computer as
12 required."

13 My understanding is what he did was refuse to sign
14 the form, which we submitted to you. It's different than what
15 you ordered. I addressed that earlier. If you have any more
16 questions about that --

17 **THE COURT:** No. I think I understand your view on
18 that.

19 **MR. LEEMING:** Okay. Fine. The other is that he has
20 tested positive for cocaine, from what I understand is twice
21 that has been verified and a third time, which apparently was
22 yesterday, and so this is -- this was verified by gas
23 chromatograph.

24 I have spoken to him at length about this. It is an
25 unfortunate situation that he is in. He participated just

1 briefly in a couple of different double blind treatment
2 options.

3 I have a letter from his physician, which I would
4 submit to the Court. I chose not to efile it. The Government
5 and Pretrial service have seen it. It is summarizing his
6 medical condition briefly at the moment.

7 There was a period where he had to take no
8 medications to get ready for a new treatment course, and
9 during that time he took various less than clinically approved
10 medications. And it is -- I think he's willing to admit that
11 -- and Dennis, please feel free to correct me if I'm wrong in
12 this -- that in ingesting those unapproved medications he
13 ended up testing positive for cocaine.

14 With that, I think he is willing to agree that he
15 violated the terms of his release by doing so, and that he
16 would participate in some kind of treatment or counseling, as
17 necessary, to address that.

18 There are a couple of concerns we have about that.
19 One is that he does not drive. He has some mobility issues.
20 He can get rides. He obviously did today.

21 And so that is our position, and I -- and the
22 intended admission, or at least the vague text of it for this
23 morning.

24 **THE COURT:** All right. Thank you, Mr. Leeming.

25 Mr. Carranza, I have your memo, but is there

1 anything you wish to add?

2 **MR. CARRANZA:** Just the positive drug test from --
3 presumptive positive drug test from last night that we were
4 informed of this morning.

5 And also, we received information from Ohio that Mr.
6 Collins informed that he used some medication that did not --
7 he was not authorized to use, and it might have been the
8 reason he tested positive for cocaine last night.

9 I spoke with the officers in Ohio. They're willing
10 to work with Mr. Collins. But he's already been to counseling
11 once, and was basically terminated for noncompliance or not
12 willing to participate in -- with the services.

13 I just wanted to make sure that if Mr. Collins is
14 given the opportunity that he takes advantage of that
15 opportunity and he fully complies with the program, and any
16 further violations could result in him coming back to this
17 district to address further violations.

18 **THE COURT:** All right. I -- I take it from Mr. --
19 thank you, Mr. Carranza.

20 I take it from Mr. Leeming's remarks that, at least
21 at this point in time, Mr. Collins is expressing a willingness
22 to participate in drug counseling as ordered by the Court; is
23 that right, Mr. Leeming?

24 **MR. LEEMING:** Is that right, Mr. Collins?

25 **DEFENDANT COLLINS:** Yes.

1 **THE COURT:** All right. Mr. Collins, I'm going to
2 modify your conditions of release to require that you
3 participate in drug counseling in light of this violation.

4 Sir, I'm going to be very direct and blunt with you.
5 If you blow this one, you're going to be brought back to this
6 district and we're going to address a more serious and
7 substantial modification of your release, indeed, your release
8 at all.

9 I just want to be very clear with you, sir, that
10 when this Court issues conditions upon which you are to be
11 released from custody, those conditions are to be complied
12 with to the letter. And it troubles me, to say the least,
13 that I've learned that you have not been able to do that.

14 I'm going to give you this opportunity. As Mr.
15 Carranza just indicated, it is in your interest to take
16 advantage of it. If I'm informed that you have not, as I
17 said, there will be consequences, and you need to that. Do
18 you understand that, sir?

19 **DEFENDANT COLLINS:** Yes, sir, I do. And may I --

20 **THE COURT:** All right. Mr. Leeming, is there
21 anything further on this?

22 **MR. LEEMING:** No, Your Honor.

23 **THE COURT:** All right. Let's consider that
24 addressed. Thank you, Mr. Carranza.

25 **MR. CARRANZA:** Thank you, Your Honor.

1 **THE COURT:** All right. Well, counsel -- Mr.
2 Figueroa?

3 **MR. FIGUEROA:** Your Honor, I'd like to address the
4 issue of urinalysis.

5 **THE COURT:** I was just going to turn to that, so why
6 don't you -- why don't you begin.

7 **MR. FIGUEROA:** Thank you, Your Honor. We request
8 that the condition requiring analysis be terminated. We don't
9 believe it's required. There's no proof that Mr. Kershaw uses
10 any illegal or drugs of any kind other than alcohol.

11 **THE COURT:** All right. So I take it your basis for
12 requesting this modification is Mr. Kershaw's sterling record
13 to date on this -- under this Protocol, and the -- the burden
14 that's associated with complying with this test regime going
15 forward; is that --

16 **MR. FIGUEROA:** Yes. He's tested clean with -- for
17 drugs. And we spoke with Pretrial Services after the last
18 court date, and it appears that there may not be a problem
19 with this request.

20 **THE COURT:** All right. Mr. Carranza, do you want to
21 address this one?

22 **MR. CARRANZA:** Yes, Your Honor. I spoke with the
23 supervising officer for Mr. Kershaw that is the district --
24 District of Utah, and he informed that all tests had been
25 negative.

1 The way they do alcohol testing is via urine
2 samples. So although he won't be -- if the Court is in
3 agreement -- he won't be testing for drugs, but he still is
4 required to submit to urine samples for alcohol.

5 **THE COURT:** All right. It would seem, Mr. Figueroa,
6 that that would -- that would still impose a burden on Mr. --
7 on Mr. Kershaw, correct?

8 **MR. FIGUEROA:** Yes, Your Honor. And we're asking
9 that the alcohol condition be modified to order him to refrain
10 from excessive use of alcohol, but not to prohibit him from
11 using alcohol whatsoever. He wants to be able to drink a
12 couple beers during a football game.

13 **MR. CARRANZA:** Well, Your Honor --

14 **THE COURT:** Yes.

15 **MR. CARRANZA:** -- there's some issues with that.

16 **UNIDENTIFIED SPEAKER:** The season is over.

17 **UNIDENTIFIED SPEAKER:** Basketball.

18 **THE COURT:** You took my line, counsel. Go ahead,
19 Mr. Carranza.

20 **UNIDENTIFIED SPEAKER:** Sorry about that, Judge.
21 I'll refrain from gratuitous comments again.

22 **THE COURT:** Go ahead, sir.

23 **MR. CARRANZA:** An officer conducted a home visit.
24 He found a substantial amount of alcohol in the residence.
25 Mr. Kershaw admitted that he had gone through counseling, and

1 on the way home he had a couple beers on the road and there
2 was some alcohol in the vehicle. The officer made him throw
3 it out.

4 So at this time we would oppose that modification
5 be --

6 **THE COURT:** Eliminated completely?

7 **MR. CARRANZA:** -- eliminated.

8 **THE COURT:** Yeah.

9 **MR. CARRANZA:** I think there should be no alcohol at
10 all.

11 **THE COURT:** Anything further, Mr. Figueroa?

12 **MR. FIGUEROA:** Submitted.

13 **THE COURT:** All right. Well, I am -- based on the
14 information I have received, I'm -- I'm not persuaded that a
15 modification is warranted at this time. I am concerned about
16 evidence of excessive use.

17 However, I think a prohibition on excessive use
18 alone would be insufficient to assure compliance, and so I
19 will keep the urinalysis requirement as it stands.

20 Counsel, have I missed anything on our agenda?

21 **MR. MILLER:** Pardon me, Your Honor?

22 **THE COURT:** Yes, sir.

23 **MR. MILLER:** My name is Mark Miller. I'm the
24 aftercare treatment specialist in Northern Ohio. I'm with Mr.
25 Collins here.

1 **THE COURT:** Well, sir. Go ahead.

2 **MR. MILLER:** I apologize for interrupting, but Mr.
3 Collins had some issue with the treatment agency that we are
4 referring him to for services, which we --

5 **THE COURT:** Go ahead, sir. I'm listening.

6 **MR. MILLER:** Okay. Which we intend to counseling
7 there. However, he made -- to wanting to find his own
8 counseling or counseling services, so I just wanted to address
9 that before we leave this phone conference.

10 **THE COURT:** All right. Well, you -- you -- you were
11 breaking a little bit, sir, so I may have missed a couple of
12 the things you were saying.

13 Is the issue the where Mr. Collins is receiving his
14 treatment or --

15 **MR. MILLER:** Well, he has indicated that -- that he
16 has a problem with where he is at least going to receive the
17 treatment. That's our contract agency that we use in this
18 district that provides services for almost all of our Pretrial
19 and probation either offenders and Defendants.

20 He made some vague reference to he and his attorney
21 working out something to find another counselor that would be
22 more suitable for him, but our intention here would be to
23 continue him with that treatment agency, unless or until we
24 found some other counselor that we found to be suitable.

25 **THE COURT:** All right. Well, I have his attorney

1 standing at the podium. So Mr. Leeming, do you want to speak
2 to this?

3 **MR. LEEMING:** Of course I'm not familiar with the
4 specific program in Ohio that's the subject of this. I have
5 heard of some friction. My suggestion is this:

6 We've got two weeks for Pretrial to look into some
7 other things. Perhaps I could work with the Federal Defenders
8 Office and Pretrial Services back in Ohio and explore
9 different options and report to the Court and to Pretrial, and
10 we can -- I think we can solve this problem.

11 **THE COURT:** All right. I think that's a reasonable
12 approach. We'll keep things as they stand over the next two
13 weeks. At the next conference, whenever that may be -- I want
14 just to be clear. We are not setting a conference for two
15 weeks from today. I'm simply going to receive a report from
16 Mr. Carranza.

17 **MR. LEEMING:** And is it acceptable for me to send a
18 letter to you or an email to you -- to your clerk, Your Honor?

19 **THE COURT:** Absolutely.

20 **MR. LEEMING:** Very good.

21 **THE COURT:** All right. Sir, does that address your
22 issue for the time being? I'm not hearing anyone in the
23 Northern District on the phone.

24 **MR. LEEMING:** I take it there's no objection.

25 **THE COURT:** All right. On that note, we will stand

1 in recess. Thank you, counsel.

2 **MR. LEEMING:** Thank you.

3 (Proceedings adjourned at 11:22 a.m.)

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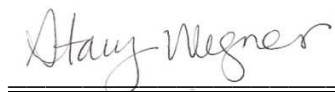
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



9/18/2012

Signature of Transcriber

Date